Office-Supreme Court, U.S.
FILED
JUN 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1973

PREME COURT OF THE UNITED STATES

October Term, 1980

NRY D. HOPSON, JUDGE, et al. - - Petitioners

versus

MMISSIONERS OF THE SINKING FUND
OF THE CITY OF LOUISVILLE - - Respondent

On Petition for a Writ of Certiorari to the
Court of Appeals of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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e 12, 1981

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QUESTION PRESENTED

ıny federal question presented for review, and if so, properly raised below, in this case, in which the cky appellate courts have held that the State's judges ferson County must pay certain local taxes in the manner as virtually all other individuals and all sses in the County and the City of Louisville?

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COURT OF THE UNITED STATES

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No. 80-1973

IOPSON, JUDGE, et al. - - *Petitioners*

ERS OF THE SINKING FUND
TY OF LOUISVILLE - - - *Respondent*

TION FOR A WRIT OF CERTIORARI TO THE
OURT OF APPEALS OF KENTUCKY

ONDENT'S BRIEF IN OPPOSITION

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ondent, the Commissioners of the Sinking
City of Louisville, respectfully requests
urt deny the Petition for Writ of Cer-
ng review of the decision of the Kentucky
peals in this case.

OPINIONS BELOW

ion of the Court of Appeals of Kentucky
vas handed down on January 18, 1980 and
t 613 S. W. 2d 621. On February 17, 1981,
Court of Kentucky entered an Opinion
n which the Court vacated its previous
ng discretionary review in this case. This
Order, together with a concurring opinion
ting opinion, is reported at 613 S. W. 2d

STATEMENT OF THE CASE

of Louisville and Jefferson County (of
ville is the county seat) levy four general
license taxes, namely the Louisville occu-
nse tax, the Jefferson County occupational
he occupational license tax for schools and
nsit occupational license tax. All of these
llected on behalf of the City and County
ondent, which is a public corporate body
er the provisions of KRS 91.130 *et seq.*
occupational taxes are each authorized by
ate statute, all of which are of similar con-
example of one such statute, KRS 91.200,
rized the Louisville license tax, provides in
ows:

00. *City license taxes — Imposition — - Collection — Transfer of surplus to gen- nd — Use — Restriction on ad valorem tax king fund purposes — Issuance and en- ent of licenses.* — (1) The board of alder- every city of the first class, in addition to ad valorem taxes, may by ordinance impose fees on franchises, provide for licensing siness, trade, occupation or profession . . . e fees on a business, trade, occupation or sion for revenue purposes may be imposed ercentage rate not to exceed those herein- et forth on (a) salaries, wages, commissions her compensations earned by every person the city for work done and services per- d or rendered in the city, (all of such being after collectively referred to as "wages"),

and (b) the net profits of all businesses, professions or occupations from activities conducted in the city (hereinafter collectively referred to as "net profits"). Licenses imposed for regulatory purposes shall not be subject to such limitations as to form and amount. . . .

(2) The rate fixed on both "wages" and "net profits" shall be one and one-fourth per cent (1¼%).

(3) License fees or taxes shall be collected by the commissioners of the sinking fund. The proceeds from the taxes shall be paid to the secretary and treasurer of the sinking fund until income from all sources of the sinking fund is sufficient to pay the cost of administration and the interest charges for the current fiscal year of the sinking fund in addition to a sum sufficient to amortize the outstanding principal indebtedness of the city on a yearly basis in accordance with regularly used amortization tables.

(4) Revenue remaining after meeting the foregoing requirements shall be transferred to the city. Such revenues shall be credited to the general fund of the city as received and may be expended for general purposes or for capital improvements.

. . .

(7) Licenses shall be issued and enforced on terms and conditions as prescribed by ordinance.

The four occupational license taxes are at present imposed throughout Jefferson County at a combined, level rate of 2.2% of (a) the gross wages and salaries paid to individuals employed by others in the County

and (b) the net income earned within the County by businesses and self-employed persons. The occupational license taxes are the leading source of revenue for local government in Jefferson County.

Inasmuch as the Petitioners are salaried officials of the Commonwealth, the occupational license taxes which they owe would be withheld from their judicial salaries and paid over to the Respondent by the State Finance Department. Contrary to their Petition to this Court, the Petitioners would not be required to register with the Respondent or to file occupational license tax returns. These requirements are applicable only to businesses and self-employed individuals. See §727.08 of the Louisville Codified General Ordinances, concerning the registration requirement, which is quoted on Page 11 of the Petition.

Municipalities in Kentucky are explicitly authorized by KRS 82.090 to impose occupational license taxes on state officers and employees, which would include judges, in the same manner as such taxes are generally imposed on others working within their boundaries. Accordingly, the occupational license taxes at issue in this case are presently withheld by the Commonwealth from all other state officers and employees working in Louisville and Jefferson County and paid over to the Respondent.

Similarly, under the Buck Act (4 U.S.C. §104 *et seq.*) and this Court's decision in *Howard* v. *Commissioners of Sinking Fund,* 344 U. S. 624 (1953), all federal employees in Jefferson County, including presumably the U. S. District Judges sitting in Louisville,

are obligated to pay the occupational license taxes. These taxes are withheld from federal employees and remitted to the Respondent by the Treasury Department and other federal agencies in accordance with 5 U.S.C. §5520.

SUMMARY OF ARGUMENT

The Petitioners are asking this Court to overrule the Kentucky appellate courts in their interpretation of the Kentucky Constitution. This request is beyond the jurisdiction of this Court to grant and does not raise a federal question.

This case was argued and decided below entirely on the basis of Kentucky law. No federal question was raised by either side before the Kentucky appellate courts, nor was any federal question passed on by either Kentucky appellate court. This Court will not consider federal questions not properly raised in state court proceedings below.

The Kentucky courts correctly held that judges should pay the same taxes in the same manner as other citizens and that their judicial independence would not be threatened by doing so. No issue in this case merits consideration by this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I. No Substantial Federal Question Presented.

As their sole federal issue, the Petitioners assert that the imposition on them of the local taxes at issue in this case would constitute a violation of their rights

under the Fourteenth Amendment, thereby giving this Court jurisdiction over the case under 28 U.S.C. §1257(3). To briefly state their position, the Petitioners argue that Louisville and Jefferson County are without authority under the *Kentucky* Constitution to levy the general occupational license taxes on their judicial compensation. Therefore, they claim, the efforts of the City and County to collect these taxes from them constitutes a taking of their property in violation of their rights under the Due Process Clause of the Fourteenth Amendment.

The position of Petitioners is on its face without merit because the Kentucky appellate courts have explicitly found that Louisville and Jefferson County are empowered under the Kentucky Constitution to levy the occupational license taxes on the Petitioners. As a review of the briefs will demonstrate, this precise issue was argued to all three Kentucky courts below, leading the State Court of Appeals to hold imposition of the taxes on Petitioners valid under §181 of the Kentucky Constitution and to pose "no threat . . . as envisioned by the lower court, to the independence of the judicial system as created under the Judicial Article [of the Kentucky Constitution]." 613 S. W. 2d at 624. A majority of the Justices of the Kentucky Supreme Court, in their concurring opinion explaining the court's order dismissing the Petitioners' appeal, indicated that they had taken such action because they believed the decision of the Court of Appeals to be correct.

It is, of course, well established law that the appellate courts of a state are the ultimate arbiters as to whether a state statute or local ordinance is valid under the constitution of that state. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). This Court is bound by the holding of the Kentucky courts that Louisville and Jefferson County may validly under the Kentucky Constitution impose their general occupational license taxes on the Petitioners. *In re Murchison*, 349 U. S. 133 (1955). Accordingly, the only supposed federal question explicitly asserted by the Petitioners is not an issue subject to review by this Court.

While they never specifically articulate it, the Petitioners are perhaps seeking to raise a second federal question in the course of their lengthy and otherwise irrelevant discussion regarding judicial independence. As best as Respondent can discern from the Petition, this supposed second issue runs as follows: If Louisville and Jefferon County are permitted to exact the local taxes at issue from Petitioners, their independent and impartial status as judges will be imperiled, resulting in a violation of the right of litigants before them to a fair trial under the Due Process Clause of the Fourteenth Amendment. Even if Petitioners have standing to raise this issue, it is not a proper question for the Court to consider for the reasons set forth below in this Brief.

II. No Federal Question Raised Below.

An essential requirement to invoking this Court's jurisdiction under 28 U.S.C. §1257 is that a substantial

Federal question has been properly raised in the state court proceedings below. The Petitioners have totally failed to satisfy this requirement. This failure, perhaps, explains why the Petitioners have also failed to comply with Rule 21.1(h) of this Court. Pursuant to this rule, a Petition for Certiorari, where review of a state court judgment is sought as in this case, must specify at what stages and in what manner the federal questions for which review by this Court is sought were raised in the state court proceedings and also indicate the way in which such questions were passed upon by the state courts.

Nowhere in any of the briefs for either side to the Kentucky Court of Appeals or to the Kentucky Supreme Court is the Fourteenth Amendment mentioned or any federal question raised. Nowhere in any of the opinions of the Kentucky Court of Appeals or Supreme Court is the Fourteenth Amendment cited or reference made to any federal question, thereby giving rise to a presumption that no federal question was presented to the Kentucky courts. *Street* v. *New York*, 394 U. S. 576 (1969).

In point of fact, this case was argued and decided below entirely on the basis of the State Constitution and other law of Kentucky. This Court, therefore, is without jurisdiction to hear this case. *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969). This Court will not decide issues which are raised on review of state court proceedings for the first time before this Court. *Tacon* v. *Arizona*, 410 U. S. 351 (1973).

III. Case Properly Decided Below and Not Worthy of Review by This Court.

Seizing upon the theoretical framework of the taxes here at issue and the word "license" appearing in their name, the Petitioners argue at length to this Court that if the Respondent has the authority to "license" them, then the Respondent must necessarily have the power to regulate their judicial functions, and that, therefore, their judicial independence and impartiality are imperiled. As both Kentucky appellate courts concluded, this argument is without merit.

The Petitioners overlook the well-established distinction between license taxes levied to raise revenue under the taxing power and license taxes and fees imposed as part of a regulatory scheme under the police power. The Kentucky statute authorizing the Louisville license tax, which is quoted hereinabove, and the similar statute, KRS 68.180, authorizing the County license tax, both expressly provide that such taxes shall be "for revenue purposes". The other two taxes, the schools and the mass transit license taxes, patently serve only to raise funds for county schools and the local bus system. The State Court of Appeals founded its decision below on its conclusion that the taxes at issue here are purely revenue measures, relying in part on *City of Louisville* v. *Sebree,* 308 Ky. 420, 214 S. W. 2d 248 (1948), in which Kentucky's highest court similarly held the Louisville occupational license tax to be solely a revenue measure.

In keeping with the revenue purpose of the taxes in issue, no regulation of any nature is imposed through

incidental to them. As the Kentucky Court of peals found,

> "There is no license issued, no certificate to be displayed, no regulations imposed, no provisions for revocation of privilege, and the sole penalty provided is a fine for failure to properly file returns." 613 S. W. 2d at 624.

the Petitioners are found liable for occupational ense taxes, the State of Kentucky will begin with- lding such taxes from the Petitioners' judicial laries and remitting them to the Respondent. No tion of any kind on the part of the Petitioners will necessary, nor will the Respondent take any further tion regarding the matter.

To reach the heart of this issue, the taxes here in spute are essentially nothing more than local income xes. Provisions of the Kentucky Constitution, how- er, prohibit the taxes from being characterized as ch, necessitating the general occupational license tax bel and framework. The Kentucky appellate courts, evertheless, have long recognized the true nature of ese taxes. See the concurring opinion in the Ken- cky Supreme Court below and the concurring opin- ns in *Patrick* v. *City of Frankfort,* 539 S. W. 2d 275 Ky. 1976), and *City of Lexington* v. *Motel Developers, nc.,* 465 S. W. 2d 253 (Ky. 1971). Similarly, in *Howard* v. *Commissioners of the Sinking Fund,* 344 J. S. 624 (1953), this Court found the Louisville oc- upational license tax to be an income tax within the eaning of the Buck Act (4 U.S.C. §104 *et seq.*).

As broad based general revenue measures, levied almost all businesses and persons working in Louisville and Jefferson County, the taxes at issue in this case are without regulatory purpose and do not afford any means by which the Respondent or local government could in any way threaten the independence or impartiality of Kentucky's judiciary. The Court of Appeals stated below, 613 S. W. 2d at 624, that it would not hesitate to declare . . . invalid" the license taxes if they were ever used for such a purpose. There is no reason for this Court not to leave to the Kentucky appellate courts the protection of the state rights in Jefferson County.

Of all citizens, judges should be among the first to shoulder their fair share of supporting local government and schools. As Justice Frankfurter wrote for this Court in upholding a statute imposing the federal income tax on federal judges taking office after a certain date:

> To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article 3, §1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution

laws they are charged with administering. *alley* v. *Woodrough*, 307 U. S. 277, 282 (1939).

to *O'Malley*, Kentucky's highest court had reached the same conclusion in *Martin* v. *Wolf*- 9 Ky. 411, 107 S. W. 2d 267 (1937), in which rt held the Commonwealth's judges to be r the state income tax immediately upon its nt.

hort, this case was correctly decided below and y merits review by this Court.

CONCLUSION

the foregoing reasons, the Petition for Writ iorari in this case should be denied.

Respectfully submitted,

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